UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Polaris Marketing, Sales Practices, and Products Liability Litigation	File No. 18-CV-939 (WMW/DTS)
	St. Paul, Minnesota
	November 28, 2018
	9:14 a.m.

BEFORE THE HONORABLE WILHELMINA M. WRIGHT
UNITED STATES DISTRICT COURT JUDGE

(MOTIONS HEARING)

Proceedings recorded by mechanical stenography; transcript produced by computer.

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P R O C E E D I N G S

IN OPEN COURT

THE COURT: Please call the case on our calendar.

LAW CLERK: Case No. 18-CV-939, In Re: Polaris Marketing.

THE COURT: Counsel, please note your appearances.

MR. TANGREN: Good morning, Your Honor. John Tangren of DiCello, Levitt & Casey on behalf of the plaintiffs.

THE COURT: Thank you, Mr. Tangren.

Are other counsel noting appearances?

MR. BARNETT: Good morning, Your Honor. Clay Barnett on behalf of the plaintiffs.

THE COURT: Thank you.

MR. FERNANDES: Good morning, Your Honor. David Fernandes of Baron & Budd on behalf of the plaintiffs.

THE COURT: Thank you.

MR. BLEICHNER: Good morning, Your Honor. Bryan Bleichner from Chestnut Cambronne on behalf of the plaintiffs.

THE COURT: Thank you.

MR. BORES: Good morning, Your Honor. Jeffrey Bores from Chestnut Cambronne on behalf of plaintiffs.

THE COURT: Thank you.

MS. DAVENPORT: Good morning, Your Honor.

Courtney Davenport from the Davenport Law Firm on behalf of the plaintiffs.

THE COURT: Thank you. Very well.

MS. WILDUNG: Good morning, Your Honor. Wendy Wildung from Faegre, Baker, Daniels representing the Defendant Polaris Industries. And I would like to introduce Your Honor to Andrew Bloomer from Kirkland & Ellis, also representing Polaris.

Finally, Your Honor, we have here in the courtroom with us Lucy Clark Dougherty, general counsel of Polaris. I would like to introduce you to her.

THE COURT: Thank you very much. If she would like to sit at counsel table, she is welcome to do so.

MS. WILDUNG: Thank you, Your Honor.

MR. BLOOMER: Thank you, Your Honor.

THE COURT: And, Counsel, are we ready to proceed on this matter, a motion to dismiss?

MR. BLOOMER: We are, Your Honor.

MR. TANGREN: We are.

THE COURT: Very well. And how will you be dividing your arguments? Will it be one counsel per side?

MR. TANGREN: I will be speaking on plaintiffs' behalf, Your Honor.

MR. BLOOMER: And the same for me, Your Honor.

THE COURT: Very well. Thank you. You may

proceed.

MR. BLOOMER: Thank you, Your Honor. Your Honor, again, I'm Andrew Bloomer on behalf of Polaris Industries and Polaris Sales, who are the defendants in this case.

First of all, Your Honor, let me say I hope you had a happy Thanksgiving holiday. Thank you for scheduling this argument. It's an honor to be able to appear and argue to this Court.

Your Honor, Polaris has filed a motion to dismiss the plaintiffs' consolidated Complaint. There are eleven plaintiffs from eleven states, one plaintiff per state, alleging claims for breach of express and implied warranty, fraudulent omission, consumer fraud, and unjust enrichment.

We have moved, Polaris has moved for dismissal of all claims except for the breach of warranty claims, both the express and implied warranty claims, asserted by California Plaintiff José Luna, L-u-n-a.

I think in the time allotted, Your Honor, I cannot address all the arguments in the briefs and Your Honor was kind enough to allow the parties extra pages -- or extra words for those briefs.

THE COURT: Yes.

MR. BLOOMER: We very much appreciate that.

THE COURT: And I have read the submissions.

MR. BLOOMER: Thank you, Your Honor. I can't

address all the arguments. I would refer the Court to the Declaration of R. Allan Pixton that was filed with our motion to dismiss. Exhibit 1 to that declaration is a chart that we thought might be helpful to the Court in terms of listing each plaintiff, each claim, and then the reasons why we respectfully submit each claim, again, with the exception of Plaintiff Luna, the California plaintiff's warranty claims, fail as a matter of law and should be dismissed.

I think given the time -- and, Your Honor, I'll obviously take any questions Your Honor has, but given the time, I'll address, I think, five reasons why the plaintiffs' claims, we submit, should be dismissed. I'll focus on these five reasons. It's a little bit like peeling an onion, Your Honor, because the claims, we argue, fail for more than one reason, so there's going to be some overlap, but at the end of the day, the end result from Polaris's perspective is that all the claims should be dismissed with the exception of the California plaintiff's warranty claims.

Reason number one is the manifest defect rule. Your Honor, that rule defeats all claims except for the breach of express warranty claims in seven states. Those states are Minnesota, Alabama, Georgia, North Carolina, Ohio, Texas, and Wyoming. The plaintiffs in those states do not allege that their vehicles ever overheated, let alone experienced the so-called engine overheat/fire defect. And

engine overheat defect is how the plaintiffs define the alleged defect they claim exists in the class vehicles.

So even though the plaintiffs from these seven states purchased their vehicles as much as a year ago and in some cases as many as three years ago for the Ohio and Texas plaintiffs, they don't allege the so-called heat defect. They don't allege that it ever manifested, it ever arose, it ever occurred.

So if a plaintiff came into this court and said I have a heat defect with my vehicle and Your Honor were to ask them has the heat defect occurred and they say no and then say, all right, did it occur either during the warranty period or after the warranty period, no, it hasn't occurred, that plaintiff would not have a claim. They wouldn't have a claim based on just the need to plead some facts under *Twombly* and *Iqbal*, the Supreme Court precedent, on providing factual support to make a claim plausible.

This situation is no different for these seven plaintiffs. There's no class certified. These are just individual claimants before the Court. And seven of these plaintiffs -- actually, eight overall, but in Illinois we did not move on the manifest defect rule in that state, but eight out of the eleven plaintiffs, eight, so three-quarters of their plaintiffs say this alleged defect has never arisen in their vehicles. They bought a vehicle. The vehicle has

performed. If there was an allegation of a defect, it should be made.

Under the manifest defect rule, which is the rule applied by the majority of courts that have addressed this issue, you cannot have an implied warranty, a consumer fraud, a fraudulent omission, or an unjust enrichment claim unless the defect actually occurs.

I'll give you an example. The plaintiffs say we lost the benefit of our bargain. We bought a vehicle that has this defect in it. So take the example of a plaintiff -- there's eight of them in this case, seven of whom we have moved on -- that says I paid for the vehicle, I've driven the vehicle, I haven't experienced the defect. Let's say they use the vehicle for its entire usable life, however many years, however many hours. Hours is how -- not so much miles, but hours is how manufacturers record usage of these particular off-road vehicles.

So a plaintiff buys the vehicle, pays for it, rides it without any alleged heat defect and, what, says I've lost the benefit of my bargain? They didn't lose the benefit of their bargain. They got the benefit of their bargain. They got a vehicle that functioned exactly the way it should have.

Take a similar example which may be -- which could be based on the facts in this case. A plaintiff buys a

vehicle. Again, the alleged heat defect never manifests, never occurs. They use the vehicle. Polaris issues a recall. Let's say it's a heat-related recall. They take their vehicle in. The vehicle is repaired free of charge, by the way, because that's how the recall works and they go on their way.

Again, how can that plaintiff say I lost the benefit of my bargain? Even if the Court were to agree with the claim that maybe there was an alleged defect, that defect got repaired with the recall repair. They got the benefit of their bargain.

On top of that, if a court were to award them money damages based on the alleged difference between the price of a vehicle without a defect and the price of a vehicle with the alleged defect, they've overcompensated them. They've provided them compensation for no harm and no injury.

THE COURT: So let me clarify which plaintiffs, and perhaps it's all plaintiffs, you're alleging this argument applies to. Is it Bruner, Lenz, Zeeck, Berens, Bailey, Jacks, Forrest, and Beattie for which you are arguing that they have not alleged an injury that's particularized and actual?

MR. BLOOMER: Right. Bruner in Alabama, Lenz in Georgia --

THE COURT: Is it Zeeck, Z-e-e-c-k?

MR. BLOOMER: Zeeck in Illinois, but Illinois does not apply the manifest defect rule, Your Honor, so we did not move on Zeeck.

THE COURT: Okay.

MR. BLOOMER: So Zeeck -- the seven plaintiffs are from Minnesota, which is Berens, B-e-r-e-n-s; Alabama, which is Bruner; Georgia, which is Lenz; North Carolina, which is Bailey; Ohio, which is Jacks. That's a plaintiff, by the way, Your Honor, who bought his vehicle more than three years ago. He filed a Complaint this year and doesn't allege that he ever had a heat issue with it. Jacks in Ohio, Texas is Forrest, and Wyoming is Beattie.

Your Honor, we have cited to the Court in our papers on-point authority, either state or federal authority, in the states of Minnesota, Alabama, North Carolina and Texas, so four out of the seven states.

We admit, Polaris admits that for Georgia, Ohio, and Wyoming this Court has to predict how those courts would rule on the manifest defect rule because those states' supreme courts have not addressed the issue. So Your Honor does have to make a prediction, as a court sitting in diversity, as to how those cases -- how those supreme courts in those states would rule on the issue.

THE COURT: Have there been intermediate appellate

court decisions on that issue in Georgia? Recognizing the value of a supreme court decision, certainly, but in determining my predictive acumen, it might be helpful if there have been decisions by the intermediate appellate court.

MR. BLOOMER: Not on the precise issue in Georgia of manifest defect.

THE COURT: Okay.

MR. BLOOMER: There is a case we cite, *Edel*, E-d-e-l, *vs. Southtowne Motors of Newnan*, where the court gets close to the issue where it says that the plaintiff's claim should be dismissed when they have made no claim under the warranty and have been denied, made no repair other than that made by the defendant at no charge, nor otherwise shown an actual injury suffered.

And in the courts that do apply the manifest defect rule, they describe it variously. They describe it as an actual injury. They describe it as lack of a legally cognizable injury. Some courts describe it as a lack of legally cognizable damages. And still other courts, and the *Zoonander* [sic] case is an example of this in Minnesota, as is the *Wallace vs. ConAgra* case out of the Eighth Circuit, they treat the issue as one of standing, no injury in fact.

There's a difference, I think, under the law. Standing is standing and it's jurisdictional and some courts

look at it and say, well, you actually haven't alleged an injury that's particularized and concrete, I can't hear the case. And you get to the same result. Courts that apply the manifest defect rule -- I'm sorry, Your Honor. I think you wanted to ask a question.

THE COURT: Well, I guess that's what I am trying to determine. Is there Article III standing or should I be looking at whether or not, you know, there's an issue at all?

MR. BLOOMER: I think the Court could look at it under either rubric. And what I mean by that is standing is one issue, which is jurisdictional. Manifest defect as substantive state law is a different issue because that -- they both get to the same result, but standing the court says I just can't hear the claim. It's Federal Jurisdiction 101. For manifest defect as a substantive state law issue, the court says I can hear the claim, but the claim fails on its merits. I think the Court, even for places like Georgia, could look at it the same way because standing --

THE COURT: Could look at what the same way?

MR. BLOOMER: I'm sorry. Could look at it from either vantage point. It could look at it and say would I predict that the Georgia court based on these authorities would find that the manifest defect rule is part of their

substantive law and would apply it or the court could say, alternatively, I know what standing is, I know what a concrete and particularized injury is, I deal with that every day in my courtroom, that's a fairly standard requirement of any action brought in federal court.

THE COURT: So if I take that approach, then it's game, set, match, we don't go any farther, there's no predictive aspect to it at all, correct?

MR. BLOOMER: I would agree with that, Your Honor.

THE COURT: Because standing is --

MR. BLOOMER: Right.

THE COURT: -- a threshold issue, correct?

MR. BLOOMER: Standing is a threshold issue and whether courts analyze the issue, which is -- you're claiming a product defect. The defect doesn't occur. Can you have a claim? Some courts have said I'm going to look at state law and determine whether as a matter of state law it's a substantive element of the claim or I look at it as standing.

I think it's kind of almost an accident of the way courts have reviewed it, understandably so because take a case -- take a situation like Texas. Texas is interesting because they have several cases that dismiss these types of claims based on standing under Texas state law. So even in state court cases, the court says you don't allege an

injury. Because you don't allege an injury, you don't have standing under state law. Forget about -- I don't need -- I'm a state court. I don't need to worry about federal standing. You just don't have standing under Texas state law.

THE COURT: So it sounds like -- I just want to make sure I understand your argument -- you're taking a belt and suspenders approach?

MR. BLOOMER: That's exactly right.

THE COURT: Two different routes, to mix metaphors --

MR. BLOOMER: I think you --

THE COURT: -- two different routes to get to the result that you are advocating?

MR. BLOOMER: I think you can get to the same place two different routes, exactly.

THE COURT: Okay.

MR. BLOOMER: Because that's how courts have done it. And recognizing that I think if the Court looks and says what does the state law -- state substantive law say and let's say the court concludes it's unclear, you don't know, maybe you're skeptical that that state court -- say Wyoming, there's very little --

THE COURT: But why wouldn't I look at what does the Eighth Circuit say about a problem like this, whether

it's a standing problem or otherwise?

MR. BLOOMER: I think you should. I think that's exactly right, Your Honor.

THE COURT: So what does the Eighth Circuit say?

MR. BLOOMER: So the Eighth Circuit has looked at this both under state law and both as a matter of standing.

The *Briehl* case, B-r-i-e-h-l, was a case against General Motors. The court said you don't have a claim under state substantive law because you don't allege that the defect actually manifested. You don't have legally cognizable injury or damages.

The *O'Neil vs. Simplicity* case, again, out of the Eighth Circuit, relying on *Briehl*, I believe, they dealt with drop-side cribs that had caused injury and maybe even deaths, I think, among infants. You had a crib that had a drop side. I have five children. I'm used to drop-side cribs. A Minnesota plaintiff sued on behalf of a Minnesota class alleging same types of claims you have here, Minnesota consumer fraud, implied warranty, et cetera, but they couldn't say that their drop-side crib had ever malfunctioned, that it didn't work. And the Eighth Circuit says, citing *Briehl* and joining what it calls the great majority of courts, says you don't have a claim, you don't have a claim under state law.

And the way that *O'Neil* addressed it -- and,

again, same claims, benefit of the bargain, I should have had a crib that doesn't have this defect. The court said, quote, "It is well established that purchasers of an allegedly defective product have no legally cognizable claim where the alleged defect has not manifested in the product they own." That's at 574 F.3d at pin cite 503. Again, quote, "It is not enough to allege that a product line contains a defect or that a product is at risk for manifesting this defect. Rather, the plaintiffs must allege that their product actually exhibited the alleged defect."

So *Briehl*, *Simplicity* both dealt with it as a question of Minnesota and other state's laws. They were both class actions.

Interestingly enough, the *O'Neil* court, district court, which was affirmed, cited a case by a Minnesota state court called *Carey*, C-a-r-e-y, *vs. Select Comfort* and that was a case where someone said I bought a mattress, the mattress retains moisture, it causes mold, it could make me ill. And the court said -- it dismissed Minnesota consumer fraud, common law fraud, breach of express and implied warranty claims because, quote, "diminished value premised on the possibility of future product failure is insufficient to support a claim for relief."

And it was sweeping. The court said plaintiff's Complaint must be dismissed in its entirety because it lacks

an essential element. It does not allege legally cognizable damages. And damages is obviously an element of every claim, whether it's implied warranty, express warranty, consumer fraud, or fraud.

Those are cases -- there's a wealth of cases in Minnesota and in the Eighth Circuit that address it that way, but there's also cases, to Your Honor's point, that address it as an Article III matter and we cite the case I mentioned, *Wallace vs. ConAgra Foods*, which is 747 F.3d 1025, out of the Eighth Circuit in 2014.

In that case -- it's an interesting case -- plaintiffs allege that they overpaid for purportedly kosher hot dogs that may have contained improperly certified meat. Now, in that case the court -- it actually cites these other cases, but the Eighth Circuit in that case analyzed it as a question of standing. The court said that the plaintiffs had not alleged a particularized actual injury in fact. It quoted *O'Neil*, but it came out a different door to the same result on the basis of Article III standing. It says you haven't shown that the meat you purchased was contaminated with a nonkosher ingredient and because of that, you haven't alleged an injury and that injury is the entire basis of your claim.

Another case that cites these cases that analyzes the issue is the *Zurn* case, which the plaintiffs cite, and

it's a case -- it's 644 F.3d 604, and we embrace that case. The issue there was that the plaintiffs said, well, we have -- we bought pipes that can be -- that have brass fittings that exhibit a defect.

Now, in that case the Eighth Circuit said there was an injury. I don't think it was clear whether it was analyzing it under state law or Article III. My reading of the case, Your Honor, is they were looking at it as state law.

But they distinguished *O'Neil*, but the reason they distinguished *O'Neil* is because the plaintiffs had shown that the defect had manifested. The court says, quote, (As read) "In contrast to the plaintiffs in *O'Neil*, the homeowners do not argue that the fittings merely risk developing this condition. They allege that the condition afflicts all of the fittings upon use, regardless of water conditions or installation practices." So they said -- so in that case the court said it had already manifested.

And the plaintiffs actually had an expert, a Dr. Staehle, S-t-a-e-h-l-e, who opined that the Zurn fittings, the defendant's fittings, as soon as they are exposed to domestic water will fail or begin to fail.

So in that case the court says this is different from *O'Neil*. You're not alleging a risk. What you're alleging is that there's already failure.

Another case, the *Zoonander* [sic] case, which is from this district court, analyzes a very similar case to *Zurn*, but comes out a different way on Article III grounds. Same kind of claim. The plaintiffs say we bought pipes that -- I'm sorry. They claim that the defendant sold pipes that it said could be used for potable water, but, in fact, it didn't and they could allow toxins into the water supply. And the court said you haven't injured -- you haven't alleged an injury in fact and because you haven't alleged an injury in fact, it got rid of the -- it dismissed the Minnesota Consumer Fraud Act claims, breach of express warranties, and they also had a tort claim in that case for negligence and negligent failure to warn.

Again, *Zoo* -- *Thunander*, which is spelled T-h-u-n-a-n-d-e-r, 887 F.Supp.2d at 850, it cited both *Briehl* and *O'Neil*, but it came out the door of Article III standing. It just said you haven't alleged a particularized injury -- a particularized or concrete injury, it affects all your claims, and it dismissed the case on that basis.

So courts in the Eighth Circuit, there's really a wealth of authority on this issue and they've analyzed it under both rubrics, but in either case the key question is did the defect manifest.

And in this case the plaintiffs say, well, the defect is heat. They say we put these ProStar engines into

our vehicles. We do. And they allege that we have ProStar engines in vehicles that have not been recalled. There's a lot more vehicles that the ProStar engine is in that are not the subject of this case. But the plaintiffs say, well, the engine creates heat. Well, that's the defect. If we put a ProStar engine into every vehicle and it doesn't overheat, then you can't possibly say there's a heat defect, but that's what the Court is confronted with in this case and in this case --

THE COURT: Why isn't that a factual issue that needs to be addressed later in the proceeding, whether the heat is the defect or it is the effect of the heat on something else that is the defect?

MR. BLOOMER: Because I think it's a threshold issue. The question is what is the defect. In this case heat is inseparable from the claimed defect. I think plaintiffs would concede under their theory if there's no heat, there's no defect. They need heat.

And so what courts say is if you're claiming a product defect, you have to plead and prove the existence of the defect. Take my example of the person who comes in as an individual plaintiff and says, I have a heat defect. Your Honor asks them, Did your vehicle overheat? No, it never has. That wouldn't pass *Iqbal*. It wouldn't pass *Twombly*.

So what courts say, whether it's implied warranty, express warranty, fraudulent omission, at the end of the day you still have to say it's a question of is there a defect. What is -- I'm sorry. Go ahead.

THE COURT: What defines the defect here?

MR. BLOOMER: They define the defect as excessive heat. They call it the engine overheat/fire defect. Their defect isn't -- it can't be separated from heat because if all they did is allege we put ProStar engines into vehicles and they didn't overheat, I think they would concede they don't have a claim.

THE COURT: And I'm certainly going to ask the plaintiffs this question too, but do the plaintiffs allege that there is overheating or there's the risk of overheating?

MR. BLOOMER: They allege, Your Honor, that there is a risk of overheating.

I mean, first of all, let's take them at their word. And what I mean by that is they've got eleven plaintiffs and eight of those people do not allege a single instance of overheating at any time despite owning a vehicle from anywhere for a year to three years or more.

And the plaintiffs in their opposition brief, I think, try to address this, but they can't -- I don't think they can avoid the fact that they allege that it's a risk of

overheating because they've got most of their --

THE COURT: An unreasonable propensity; is that correct? Isn't that one of the allegations? So if there's a propensity, that means that there is the overheating, correct, as opposed to a risk of overheating? Why isn't, if I look at the language, it an unreasonable propensity?

MR. BLOOMER: It's the same as risk. They allege risk 45 times in their Complaint. They allege propensity, I think, more than 28 times.

And the courts that have addressed manifest defect either as a question of substantive state law or Article III say the risk of something happening is not sufficient. Take the *Farsian* case in Alabama. This is probably the starkest example.

THE COURT: So it's an unreasonable propensity to do what, then? I want to make sure that we're looking at the language of the allegations to discern whether or not there's standing.

MR. BLOOMER: The answer, Your Honor --

THE COURT: Because it --

MR. BLOOMER: I'm sorry.

THE COURT: It seems to me you can't have a propensity to do something unless it has occurred and it hasn't occurred in an isolated manner, it's occurred in a manner in which, you know, under certain conditions it's

almost predictive that it's going to occur.

MR. BLOOMER: Right. And the propensity or the risk in either case has to be to overheat. We're talking about vehicles that have a gas combustion engine in them, like a car.

THE COURT: But you said risk of overheating is not enough; is that correct?

MR. BLOOMER: Correct, because courts say--

THE COURT: So propensity -- that's why I am trying to understand from you how you distinguish. And I certainly will ask plaintiffs this too, whether or not it's sufficient to hang one's hat in the legal analysis on propensity and what the basis for propensity would be.

MR. BLOOMER: Courts have treated the two issues as indistinguishable, meaning whether it's risk or propensity, it's still no injury and --

THE COURT: I just want to make sure. If a person -- I'm not going to indict myself here. If a person has a propensity to lie, doesn't that mean they lie a lot and in this circumstance they're probably lying too versus there's a risk of lying, which occurs anytime someone makes a statement?

MR. BLOOMER: But one party cannot come in and allege an injury that happened to someone else. So in the example you give, a person may have a propensity to lie.

Whether you can charge them with perjury in a specific situation will depend. Even if they may be a liar generally, the one instance that might be at issue you have to look at.

And so the courts that have looked at this do address propensity. The *Carey* case out of the Minnesota state court, which was a 2006 case -- that's the case that was cited by the *O'Neil* district court and the *O'Neil* district court was affirmed by the Eighth Circuit -- the court says, "This court agrees with those cases that find that an allegation of diminished value due to a propensity to fail is too remote, conjectural, and speculative." That's at 2006 Westlaw 871619, pin cite Star 4.

So courts have said propensity is not enough because it wouldn't satisfy -- Your Honor, I don't think that would satisfy -- come close to satisfying Article III.

In *Thunander*, the case where -- the district court case out of this court where Minnesota claims were alleged and the parties said I bought a house, it has this piping, supposed to be rated to handle potable water, but it doesn't, the court said: Have you tested it? Do you have toxins in your water? Well, they had never tested it, but it had happened elsewhere. The company had documents that show it happened. And the court said that doesn't get you to first base, you don't have an injury.

I mentioned the *Farsian* case. This is an interesting case. I'll admit it's sobering. That's a case out of the Supreme Court of Alabama that involved a heart valve, a heart valve that had allegedly caused like 200 deaths. A person comes in and says, I have this heart valve. It has a propensity to fail. I don't have to -- you know, do I have to wait for it to fail in my chest to have a claim? And the Supreme Court said you don't have a claim because what you have is a risk or a propensity that that thing could fail, but until you do, under our law you don't have a claim.

So I think to answer your question, Your Honor, propensity, risk, it's the same thing because at the end of the day there needs to be -- you need to show actual injury or damage under state law and you need to show a particularized and concrete injury under federal Article III law.

THE COURT: Thank you, Counsel. Your time has expired.

MR. BLOOMER: Okay. Thank you for your time, Your Honor.

MR. TANGREN: Good morning, Your Honor.

THE COURT: Good morning.

MR. TANGREN: Your Honor is, I think, rightly focused on exactly what the defect is here that plaintiffs

have alleged, so I will address that one first if you would like to take the opportunity to ask me the question you indicated you would like to ask about exactly what it is we allege.

I'll direct the Court's attention to our Complaint, specifically paragraph 7, where we lay out exactly what it is about these off-road vehicles that we believe poses a defect and an unacceptable risk of fire.

What happens here is that the piping that takes the exhaust away from the ProStar engine, which, as you know, we've alleged is too powerful to be housed within the chassis in which it is housed, this piping lacks proper ventilation and heat shielding and is positioned within inches of combustible plastic body panels. Thus, the hottest area of this engine is located inches behind the occupants in an area of the vehicle that is enclosed with little room for air flow to dissipate the high heat.

These extremely high temperatures, combined with inadequate cooling and heat shielding, result in melting of plastic body panels and the ignition of any combustible material that is surrounding the engine, which can lead to potentially deadly fires.

What we're alleging here is not a risk of overheating. It's not a propensity of overheating. It is actual overheating due to a condition that is immediately

and easily apparent to someone who opens up the engine and knows where to look.

Again, at paragraphs 103 to 105 of the Complaint this theory of defect is laid out in a little more detail, along with pictures where the Court can see exactly where the pipe goes and why it creates the overheating condition inside of the vehicle.

To be clear, this is not a case like *O'Neil*, for example, or *ConAgra* where it is unclear whether the plaintiff's specific product actually has the defect. One can take any of plaintiffs' vehicles and just turn them on and within just a few minutes you can tell. You can put your hand on the seat, you can put your hand on the side of the vehicle and you can feel the excessively high temperatures. This is an overheating defect that is manifested in every single one of these class vehicles. So for that reason --

THE COURT: So what makes it -- as opposed to heated, what makes it overheated?

MR. TANGREN: Well, it is --

THE COURT: Is there supposed to be no heating whatsoever?

MR. TANGREN: It is overheated in the sense that it creates an unacceptable risk of fire and it also results in degrading of the vehicle over time, which poses problems

in and of itself in terms of structural integrity.

No responsibly designed vehicle would have these kinds of temperatures that expose the vehicle to structural damage, expose the passengers to the possibility of burning, and last, but not least, creates an unacceptably high risk of vehicle fires, which has already occurred in, you know, several of the plaintiffs' vehicles despite the limited amount of time in which they've been operated since they've been purchased.

THE COURT: So you have actual overheating and fires in all or certain --

MR. TANGREN: We have fires in three of them and we have significant overheating in all of them, Your Honor.

THE COURT: And the overheating is measured by?

MR. TANGREN: Overheating is measured by the engineering standards that would apply to the way that these vehicles have been designed. A vehicle that has this level of heat that creates this kind of risk of fire is just excessive in overheating. So --

THE COURT: So there's no standard, is there?

MR. TANGREN: There's a standard at common law that these vehicles be designed in a way that presents a risk of fire that is acceptable to consumers as a matter of reasonableness, as a matter of materiality.

The risk of fire in these vehicles has reached a

point, Your Honor, we allege, that Polaris breached its warranties, that the risk of fire renders them unmerchantable, it renders them defective insofar as it breaches Polaris's express warranties to repair any defects in these vehicles, and it also creates a breach of Polaris's duty to disclose any material defects in the vehicle to these consumers.

These are common law standards and they depend on standards of reasonableness, standards of duty of reasonable care and they've been breached in this case, Your Honor, and they've been breached in every vehicle, not simply those vehicles that happen to catch on fire.

And one helpful way to think about this is to compare this case with the Eighth Circuit cases that Mr. Bloomer discussed a few minutes ago and which Your Honor is correctly focused on.

In the *O'Neil* case, for example, that case featured defects in the drop side of a crib. The cribs at issue, prior to the drop side separating from the crib and creating a gap where a child could become trapped and get injured or possibly even killed, the cribs to anyone just looking at it appear to be working just fine and apparently in many cases the cribs did work just fine.

By contrast, in the *Zurn Pex Plumbing* case, a case with which this case is on all fours, in that case the

corrosion of the pipes at issue happened in all of the pipes, beginning with when the pipes were first exposed to moisture, when the pipes were first installed and when they first began to convey water. That was something that the plaintiffs were able to demonstrate.

And similarly here, this defect involves overheating that affects all of the vehicles. It's overheating that can be easily demonstrated both by a physical inspection of the vehicle and by touching the vehicle while it's in operation to feel that excessive heat.

The parties engaged -- and it's an interesting exchange and it's one that we believe Your Honor needs to look at for purposes of other state law outside of Minnesota on whether even if we had not alleged a defect that had manifested, whether we could still raise a claim for a latent defect in the same way that the *GM Ignition* and *Takata* courts, for example, have allowed plaintiffs in many states to do.

But for purposes of applying Minnesota law -- and also Your Honor may also -- can also reach the same result in these other states by simply noting that here the manifest defect rule is satisfied because we have alleged a defect that is exhibited in each one of these vehicles.

THE COURT: And the defect is? Just identify the defect, to be clear.

MR. TANGREN: Sure. The defect is an engine and exhaust piping from the engine that have been installed in the vehicle in such a way as to create overheating every time the vehicle is in operation.

And as I mentioned just a little while ago, it may be helpful to take a step back and look at how the manifest defect rule has evolved over time. There are a number of cases --

THE COURT: And let me just -- creates overheating every time. The overheating is manifest how? How do we know this? What's our governor?

MR. TANGREN: We can look at, for example -- unlike a crib where if the drop side has not separated from the body of the crib, the crib appears to be perfectly fine, can hold a child, there's no gap where a child can get trapped, here if you take any of these class vehicles and open them up, you can see that the exhaust piping runs right underneath where the passengers occupy the vehicle when it's in operation, you can see that there's inadequate space for the engine to dissipate that heat, and most importantly, when you turn the vehicle on, you can feel on the seat, you can feel on the side of the vehicle there is heat that is excessive, that when it is allowed to build up creates an unacceptably high risk of fire.

If you were to take dry leaves, for example, and

stuff it into that engine compartment, which can happen frequently when the vehicle is out and riding around, then you would fairly easily create a situation where a fire would result inside of that vehicle.

And so that is the major and critical distinction between the case we have here on one side, along with cases like *Zurn Pex*, and in cases on the other side, like *O'Neil*, like the *ConAgra* case counsel referred to a short wile ago where plaintiffs could not demonstrate that the hot dogs they had purchased were kosher or not kosher. In fact, it seemed likely that the hot dogs were kosher and that the situation that they were suing under was a situation that impacted other plaintiffs, but not them.

THE COURT: Okay. And so we're measuring or defining the term "overheating" based on what you can feel with your hands? And where is it alleged that it occurs every time?

MR. TANGREN: It's alleged in our Complaint at paragraphs 6 to 7 and also paragraphs 103 to 105. We explain how this overheating occurs. We explain how it results from an engine design that is present in each one of these vehicles.

And as Your Honor asked before, is this an issue of fact that precludes a ruling on a 12(b)(6) motion in favor of defendants? We absolutely believe that it does.

We look forward to doing further expert work on exactly how high the temperature would be before it trips over that threshold to be overheating. We believe that --

THE COURT: Why shouldn't that have been done before the allegation was made as to overheating? You're saying it overheats every time, but we're going to have somebody tell us that it overheats.

MR. TANGREN: We have the evidence now that shows that these vehicles have exhibited overheating, which resulted in multiple fires. We have multiple recalls from the company, which is essentially an admission that at least for some of these vehicles in the class they have recognized that there is an overheating problem.

We don't believe that there's a requirement that you have an expert report prior to filing suit in any case and we believe that the evidence here is more than sufficient to support an inference under *Twombly* and *Iqbal* that this overheating does occur.

And if Your Honor has no other questions on that issue, I will turn next to the manifest defect rule and how it has evolved over time.

We have a few cases from over 20 years ago where courts that were presented with cases where it didn't even appear that there was a defect at all sometimes would dismiss those cases, speaking of them in terms of, well, the

defect hasn't exhibited or hasn't manifested in the plaintiffs' vehicles.

In the last few years the manifest defect rule has been used quite frequently. The *GM Ignition* case, which is cited frequently throughout the parties' briefs, is one of them. Polaris's counsel here today has been instrumental in pushing that issue forward in that case.

The *Takata* airbag case is another example where simply because of the size of those cases Judge Moreno in Florida and Judge Furman in New York have thought through these issues very, very thoroughly and have both come to the conclusion that, in fact, if you look at what the benefit of the bargain rule was designed to do, in most of these states plaintiffs should, in fact, be allowed to pursue a claim for economic harm due to a product defect even if that product defect is latent, even if that product defect isn't clear or isn't manifest or hasn't been exhibited in each of the plaintiffs' vehicles simply because of the dangerous condition that those defects pose, in the *Takata* case the fact that an airbag can go off and kill the occupants inside or in *GM Ignition* that the key in the ignition can flip back, turn the car off just before it crashes, and the airbag won't inflate.

To be clear, as I said a minute ago, we think this case is different from that because there is a clear

manifest defect, but if Your Honor has remaining doubts about whether we've pled that clearly enough in the Complaint, at the very least we believe that for the reasons discussed in those cases and for the reasons discussed in the state courts as well in most of these states, even a latent defect, even a defect that does not manifest until something catches on fire or until someone is killed is sufficient to allow plaintiffs to recover on a theory of economic harm.

I'll briefly walk through the states at issue. We've already discussed Minnesota.

The *GM Ignition* court allowed plaintiffs to proceed on a latent defect theory based on its reading of the *Zurn Pex* case.

In Alabama, the *Takata* court has recognized that a plaintiff can proceed under the Alabama consumer protection statute for a latent defect.

And in California, in *Benkle v. Ford Motor Company* the court there also allowed Alabama warranty claims to proceed for a latent throttle body defect.

The case that Polaris relies on mainly, *Ford Motor Company vs. Rice*, was a case decided 20 years ago and it was a case where plaintiff's vehicle had operated free of incident for 15 years, so there was some healthy skepticism there about whether there was actually a defect in the

vehicle at all.

In North Carolina, the *Coley v. Champion Home Builders* case at 590 S.E.2d 20 establishes Plaintiff Bailey's right to recover for his defective vehicle. In that case the plaintiff's allegation that their mobile home tie-down systems could possibly malfunction during high winds was sufficient to allow them to proceed.

The cases that Polaris relies on are inapplicable because in each of those cases the court found that the plaintiffs had failed to prove an actual defect.

In Texas, the controlling decision on this issue is *DaimlerChrysler Corp. vs. Inman*, which was decided by the Texas Supreme Court in 2008. In that case the Texas Supreme Court affirmed the Fifth Circuit's holding in *Cole vs. General Motors Corporation* that allowed the plaintiffs to proceed on an economic damages theory for a latent airbag defect theory that had not exhibited in their vehicles.

Most of the authorities cited by Polaris predates *Inman* and, we would submit, has been implicitly overruled by *Inman* to the extent that they are irreconcilable. While we recognize that the *GM Ignition* court reached a different result, we would submit that it's the Texas Supreme Court's thinking on this issue that rules, not the *GM Ignition* court's, not an out-of-state federal New York court.

Polaris concedes that there's no clear authority

in Georgia, Ohio, or Wyoming on these issues. The *GM Ignition* court went ahead and did hold that under Georgia law you can proceed under a fraudulent omission theory for a latent defect. This was also true under Ohio law for the implied warranty and tort claim and for the Ohio consumer protection statute. And then we also have the *Whirlpool* litigation that went up to the Sixth Circuit where plaintiffs were allowed to proceed, again, on a latent defect theory.

And for the same reason that plaintiffs have alleged harm for the product defect that exhibits in each of their vehicles, we also allege Article III standing, which permits us to proceed in federal court.

THE COURT: Okay. I want to get to the unjust enrichment claims and particularly focusing on Florida. How do those claims survive in this instance?

MR. TANGREN: Certainly. In Florida plaintiffs cited the *Solidda Group, S.A. vs. Sharp Electronics Corp.* Case, which is 2014 Westlaw 12513613.

THE COURT: So it's unpublished?

MR. TANGREN: Right, right. In that case the court recognized that a direct benefit for purposes of establishing an unjust enrichment claim may be conferred without traveling through any third-party intermediary.

Polaris relies heavily on an earlier case,

Extraordinary Title Services, but *Solidda* came after that case and we would submit is more consistent with what appears to be the majority, if not unanimous, rule when it comes to determining whether a benefit has been conferred for unjust enrichment purposes, which is is there a sufficient nexus, is there some relationship between the plaintiff and defendant, short of the two parties having engaged in a direct transaction with each other, that would permit a court to find that a benefit has been conferred.

And we believe here, and this is generally the result that courts reach, when you're dealing with a vehicle manufacturer that has warranted a vehicle, that has provided a warranty to a consumer that that consumer can rely upon, that in that case, even if there is a dealership that acts as an intermediary, the fact that there's that warranty and also the fact that that dealership is authorized by the manufacturer explicitly to sell its products is sufficient to create a nexus that allows a direct benefit for unjust enrichment purposes to be conveyed.

THE COURT: I guess I'm still puzzled because it seems that Florida requires plaintiffs to purchase the vehicle directly from the defendant's manufacturer or dealership to state a claim for unjust enrichment.

MR. TANGREN: If I recall the cases under Florida law, and this is true for many of the cases in the other

states as well, what we have there are cases where -- the one that comes to mind most readily is the *Whirlpool* case where the court held that there wasn't a sufficient transactional nexus.

In that case we were dealing with Whirlpool washers that were sold by third-party stores like Best Buy and H.H. Gregg. You didn't show -- there weren't the same kind of dealerships in the way there are for Polaris or for auto manufacturers.

In fact, if I recall, I don't believe there have been any cases cited in the papers on this unjust enrichment direct benefit issue involving an automobile or other vehicle manufacturer selling a vehicle through its dealership to a consumer where the court did not find that that conveyed a sufficient transactional nexus to find that a direct benefit had been conferred.

THE COURT: Okay.

MR. TANGREN: And possibly, you know, since Michigan law is helpful on these vehicle issues, I'll note that under Michigan law the cases that plaintiffs cite, including the *Auto Parts Antitrust Litigation*, established that a direct benefit can be conveyed in the same way.

And the case that Polaris relies on, *Storey*, was a case that did not involve a vehicle sale and there was no allegation that the parties had interacted in any way,

unlike the interaction that happens here where Polaris warrants that these vehicles are free of defect, the warranty that is at issue now that plaintiffs have brought claims for breach of express and implied warranty.

THE COURT: So as I look at the *Whirlpool Corporation* case from the Eastern District of Michigan in 2017, it indicates that Michigan law requires a direct benefit or some sort of direct interaction --

MR. TANGREN: Right.

THE COURT: -- between plaintiffs and defendants. That's what -- you're relying on some sort of direct interaction?

MR. TANGREN: We're relying on the fact that a warranty is conveyed to the consumer and also the relationship between a vehicle manufacturer and its dealerships, we would submit, is tighter than the relationship between, say, an appliance manufacturer and the department stores that sell those appliances.

THE COURT: How so?

MR. TANGREN: Each of the purchases made here were made at Polaris authorized dealerships.

So, for example, if I go and I want to buy a car and I go to -- when my wife and I bought our Toyota Camry, we went to the local Toyota dealership. The Toyota logo was displayed prominently on the side of the building. The

people who sold us the car wore uniforms that had the Toyota logo on them. When we signed our paperwork, the paperwork had Toyota's logo on it and Toyota's name featured prominently throughout.

Similarly here, when you go to purchase a Polaris vehicle, the Polaris logo is featured. The dealership can rely on the good name and credit of Polaris to back up that the vehicles are good vehicles, and that's exactly what Polaris intends to do when it provides a warranty to the consumers.

A vehicle is a different sort of product than an appliance where people understand that, you know, Best Buy doesn't necessarily stand behind the nondefective nature of the appliances it sells. You're on your own in terms of what you want to do to -- if your DVD player breaks down or you washer breaks down, you need to go directly -- you don't go back to Best Buy. But here the entanglement between the dealership and the manufacturer is much tighter, and this is what courts routinely hold in cases involving vehicle defects.

THE COURT: Anything further at this time?

MR. TANGREN: If Your Honor has nothing further on the unjust enrichment claim, then our arguments on the other issues that were raised by defense counsel on fraudulent omission and on warranty are laid out in our papers. If the

Court has no questions on those, we're happy to conclude our presentation.

THE COURT: Thank you.

Rebuttal.

MR. BLOOMER: Thank you, Your Honor. Very, very briefly.

My friend across the bar said that plaintiffs have alleged significant overheating in all vehicles. That's not the case. Their Complaint does not say that heating is inevitable. It doesn't say it will occur in every vehicle. It does not say that it occurs the first time the vehicle is used. They can't make those allegations. They've got eight plaintiffs who don't allege any heat whatsoever who have owned their vehicles for a year or more. That's a problem. What they do allege repeatedly is a risk or a propensity, and the courts say that isn't enough under state law, that's not enough under Article III.

Your Honor makes a good point about the governor. There is no governor here. There's no standard that they've alleged. They say the defect is overheating. In *Zurn* the reason the plaintiffs were able to sustain their claim in that Eighth Circuit case is because they had an expert who came in and said the second water goes through these pipes, they fail. They said -- the court explicitly says the pipes had exhibited the defect.

We have eight plaintiffs here who don't say that. They've been driving their vehicles. They've got other plaintiffs who do, so they can make the allegations if the allegations exist.

THE COURT: And let me make sure. *Zurn* was at the same stage of the proceedings as this case is?

MR. BLOOMER: I believe it was, Your Honor. I believe it was a -- I can check very briefly.

THE COURT: I'll take a look at it. We've got the case too. I don't want you to spend your time in that way.

MR. BLOOMER: Thank you, Your Honor.

The interesting thing about the *GM* case and obviously Your Honor -- I have nothing but the utmost respect for Judge Furman in the Southern District of New York. I have spent significant time with that court over the last four years. He's a wonderful judge. I don't agree with him on everything. Obviously Your Honor is not bound by his rulings.

The plaintiffs like to cite Judge Furman when it helps them. They don't like to cite him on things like Texas where he poured out the plaintiffs' claims, like the plaintiffs' claims here, on the manifest defect rule, but he did that as well.

I would say that -- plaintiffs say that the *Rice* and the *Farsian* cases in Alabama are older cases. We cite

Hinton in 2001, *Southern Bakeries* in 2002. And if the Court looks at cases like *Zoonander* [sic] in this district, other cases, the manifest defect rule comes up in these cases. It's not some old relic of the past. It is very much a principle whether analyzed under substantive state law or Article III standing.

For Florida on unjust enrichment, I think Your Honor is right. *Extraordinary Title* is the case we cite, 2009 from the Florida Court of Appeals. It's a state court appellate court, a decision which the Eighth Circuit under the *Rucci* case, R-u-c-c-i, says is entitled to great deference. That case, *Extraordinary Title*, has been repeatedly cited by Florida and state courts since it was decided. The single case cited by plaintiffs, *Solidda*, in four years since it's been decided hasn't been cited by another court.

I would also point out, and we argue this in our brief and I'm sure Your Honor knows that, that Your Honor doesn't even need to reach the direct benefit point. You've got -- every plaintiff alleges a written contract, the warranty that they say was the basis of their bargain, and they allege adequate remedies of law in the form of money damages under their implied warranty, consumer fraud, and fraudulent omission claims.

They can't have -- you can't have an unjust

enrichment claim when you are alleging, affirming, and trying to enforce a contract to begin with and you can't have unjust enrichment, which is an equitable claim, when you have an adequate remedy at law, which they allege.

THE COURT: Why can't you plead in the alternative?

MR. BLOOMER: Because they didn't plead in the alternative. What they did here is they actually alleged the existence of a contract in every count of their Complaint, including the unjust enrichment count.

So courts have said if you want to plead in the alternative, if you're not certain that there was a contract and you want to say if there was a contract, it's a breach of contract and if there wasn't a contract, then it's unjust enrichment, you can do that. But they didn't do that. They didn't plead in the alternative.

What they did was to affirm and seek to enforce and sue over a breach of a written contract and they incorporated those allegations expressly into all their claims, including the unjust enrichment claims, which I think is fatal.

THE COURT: Well, why shouldn't I be reading that pleading liberally and giving it a liberal construction such that I read it as an alternative? Is there no legal grounds to read it in the alternative?

MR. BLOOMER: I think the plaintiffs are masters of their Complaint and I think that they need to put the defendant on notice of what their claim is. If they think there is no written warranty or they're not sure they got a written warranty, I understand that and they have to plead it.

But when they plead there is a contract and on top of that they plead claims that give rise to adequate remedies at law in the form of money damages, I just don't see how even under Rule 8 or a liberal construction of the pleading standards there's not a fatal conflict or a fatal problem with that type of a pleading, but Your Honor is the judge and you will decide.

THE COURT: Well, I am going to look for the law that says that you can't plead in the alternative or that the manner in which this is pled is not in the alternative as recognized by courts.

MR. BLOOMER: Fair enough.

Two more points, if I may, Your Honor, briefly. The plaintiffs cite the *Inman* case out of the Supreme Court of Texas. Texas has -- the law is chock-full of cases tossing claims on manifest defect and Judge Furman cites a number of those cases when he tossed the plaintiffs' claims in the GM MDL.

But what was interesting and was curious to me is

that the plaintiffs -- I was scratching my head as to why they would cite the *Inman* case. In that case the plaintiffs allege that a buckle was defective and that the buckle had -- the defect, just like they do here, they say it was manifested the moment it was sold until the present. And the court tossed it out saying they hadn't -- they dismissed the claim saying that the plaintiffs had not suffered a concrete and legally compensable injury and thus lack standing under Texas law. They said, (As read) "We do not rule out the possibility that somewhere there may be owners or lessees of vehicles with Gen-3 seat belt buckles that can allege concrete injury. Our focus is on Plaintiffs Inman, Castro, Wilkins and they have not shown they can. We simply think that the rights of 10 million vehicle owners and lessees across the United States should not be adjudicated in an action brought by three plaintiffs who cannot show more than the merest possibility of injury to themselves." That is what you have in this case with respect to the eight plaintiffs, seven of whom on which we have moved on manifest defect.

One more point, Your Honor, that I'm compelled to make. I was reviewing the materials over the last couple of days and in our briefs we argued that the Michigan plaintiff, whose name I believe is Berens, that he failed to allege an issue within the warranty time period both for his

express and implied warranty claims. I was re-reading the Complaint and in paragraph 114 they do allege that he had an issue. Michigan is not a claim we're moving on for purposes of manifest defect because he did allege overheating. Someone who had it alleged it. But we did move on that ground. We should not have moved on that ground because, looking at the Complaint, they did allege on the face of it that he had an issue within the warranty period.

The plaintiffs, I don't know if they noticed it or didn't notice it. They didn't argue it. But I have a duty of candor to the Court, which I take very seriously, and so I wanted to make the Court aware of that, that we withdraw our motion with respect to the Michigan plaintiff.

I will say we withdraw it on the basis that he didn't allege within the time period of the warranty. His warranty claims still fail because he alleges UCC warranty claims and he didn't give pre-suit notice. So under our theory we get to the same result, but only on the one leg of the stool, not the other leg of the stool, but I wanted to bring that to the Court's attention.

THE COURT: I appreciate your candor, Counsel. That is very helpful to the Court --

MR. BLOOMER: All right.

THE COURT: -- and also very much reflects well on you and, frankly, the members of the bar.

MR. BLOOMER: Thank you, Your Honor.

THE COURT: That being said, this matter is taken under advisement. I will stop there because I see that there is counsel who wishes to speak.

MR. TANGREN: I have nothing further on the motion, Your Honor. I just wanted to let you know that there is a minor housekeeping matter we should probably discuss while we're all here.

THE COURT: Okay. So the motion is taken under advisement and we can address the other matter that needs to be addressed.

MR. TANGREN: The parties have been discussing while the motion to dismiss has been pending -- the parties differ on the extent to which discovery should be allowed, but it seems that we are close to agreement that there will be some preliminary production by Polaris. We're currently negotiating the confidentiality and electronic discovery protocol orders that would allow that to happen. We don't anticipate that there will be any issues, but if it does appear that there is something that we need to bring to the Court's attention, we just need Your Honor's guidance on the best way to do that.

THE COURT: What do you mean, something that needs to be brought to my attention that bears on this motion before me --

MR. TANGREN: Not on the --

THE COURT: -- or other matters relating to discovery and how the case proceeds, which typically would go to a magistrate judge?

MR. TANGREN: That was what we had anticipated might happen, is that it would be a magistrate judge that would hear those.

THE COURT: Okay.

MR. TANGREN: So we wanted to make sure that is what Your Honor intended and that we will bring that to the magistrate judge's attention if we're unable to agree.

THE COURT: That is my expectation. I will be addressing the motion to dismiss. If something occurs during the course of your discussions with the magistrate judge to resolve other issues that affects this motion to dismiss, then that would -- I would want to know that.

MR. TANGREN: I don't anticipate that there will be any relationship between the two.

THE COURT: Okay. Very well. Thank you. Anything further at this time?

I want to thank counsel for being extremely well prepared and providing well-reasoned and strong arguments for both of your parties, which is of great assistance to the Court, both written and orally. Thank you.

COUNSEL: Thank you, Your Honor.

(Court adjourned at 10:23 a.m.)

* * *

I, Lori A. Simpson, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Lori A. Simpson*

Lori A. Simpson, RMR-CRR